No. 48792-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF TACOMA, *RESPONDENT*,

v.

CHEVALIER LEE, *APPELLANT.*

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT

BRIEF OF RESPONDENT CITY OF TACOMA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

EVIDENCE RULES:

I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

A. Whether the trial court's exclusion of testimony regarding Lee's state of mind denied him his right to a fair trial.

B. Whether the City improperly commented in closing argument on Lee's right to silence.

C. Whether Lee was denied effective assistance of counsel by failing to object during the City's closing argument and failing to object to the officer's answer on redirect examination.

D. Whether cumulative error deprived Lee of a fair trial.

II. STATEMENT OF THE CASE

On January 25, 2015, Louis Gonzalez Hernandez (Hernandez), his wife Alice Gonzalez (Gonzalez), and their children were at home in Tacoma. (1RP 88-89).[1] A family friend, Robert Staunton, was staying with them. (1RP 92, 2RP 11). Appellant Lee and his girlfriend Danielle Spicer were family friends and came to visit that night. (2RP 23-24, 28).

Lee and Spicer were playing cards at the dining table. (1RP 92). Gonzalez heard Lee yell obscenities at Spicer and Hernandez told Lee to leave. (1RP 94, 98-99). Hernandez told him to leave several times. (1RP 99-100). Lee refused to leave even after being told the police were called, but he and Spicer eventually left. (RP 101-02).

[1] Three volumes of Report of Proceedings. Volume I referred to as 1RP, Volume II as 2RP, Volume III as 3RP.

Staunton also heard Lee swear at Spicer. (2RP 13-14). When Hernandez told Lee to leave he refused and was "indignant" and "started getting in Gonzalez's [Hernandez's] face." (2RP 14-15). Lee came towards Hernandez and got within inches of his face, still refusing to leave. (2RP 16). He swung at Hernandez and Hernandez wrestled him to the ground but was not punching him. (2RP 16).

Hernandez testified that he heard Lee swear at Spicer. (2RP 30). He told Lee to leave because of his language and tried to walk him to the door to get him to go. (2RP 31, 46). He was unarmed and had his hands down as he continued to tell the defendant to leave. (2RP 32, 41, 46). Lee argued with him, called him a "f****** b**** and hit him in the left eye with his fist. (2RP 31-32). Hernandez pushed Lee away to contain him and keep him from throwing punches. (2RP 33, 41). The two grappled with each other but Hernandez did not hit Lee back. (2RP 41, 47). Hernandez sustained a bump over his left eye. (2RP 42).

Spicer testified that she and Lee had a disagreement about her leaving or hanging out longer. (2RP 55-56). Hernandez told Lee to leave because of the yelling but they tried to explain that they were only having a "little argument." (2RP 59). Lee continued to argue and swore at Hernandez and Hernandez quickly "came after" Lee with his hands up and

the two wrestled on the ground. (2RP 59-61). When questioned about the investigation of the incident she stated that the police never got a hold of her to interview her. (2RP 66).

Lee testified that he argued with Spicer about her wanting to leave but denied calling her names. (2RP 76). He admitted to raising his voice and using bad language. (2RP 76-77). Hernandez told him to leave a couple times but he tried to "reason with him and calm him down." (2RP 78, 86). He "cussed" at Hernandez and "should have left and . . . just decided I'm getting the last word in." (2RP 79, 81). He stated that Hernandez "sprang" at him and came at him with his hands up, he was scared and Hernandez did not hit him back. (2RP 79-80).

Tacoma Police Officer Mires responded to the 911 call. (1RP 78-79). He spoke with Hernandez and saw that he had a lump above his left eye. (1RP 80). The officer interviewed Gonzalez, Hernandez and Staunton. (1RP 81, 2 RP 18). Lee and Spicer left before the police arrived. (1RP 82-83). Officers attempted to locate them but were unsuccessful. (1RP 83).

The jury found Lee guilty as charged with assault in the fourth degree. (3RP 1). Following his conviction in Tacoma Municipal Court he appealed to the Pierce County Superior Court and his conviction was

affirmed. Lee petitioned for Discretionary Review and this Court accepted review.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR BY EXCLUDING TESTIMONY THAT WENT TO LEE'S STATE OF MIND BECAUSE THE EXCLUSION DID NOT BAR HIM FROM PRESENTING HIS THEORY OF SELF-DEFENSE.

Lee argues that his Sixth Amendment right to present a defense was violated because the trial court excluded testimony from Spicer about an incident that occurred prior to January 25, 2015. Defense counsel intended to elicit from her that she and Lee were at the Hernandez's home four nights earlier and witnessed "some sort of domestic dispute where Mr. Gonzalez [Hernandez] actually was alleged to have been physical with his wife." (2RP 62). Counsel explained that this testimony went to *Lee's state* of mind when acting in self-defense and whether *he* knew Hernandez had the capacity to be violent. (2RP 63-64). The City objected on relevancy grounds and that the testimony would open the door with regards to prior incidents involving the defendant and the court agreed. (2RP 63). Notably, defense counsel did not attempt to make an offer of proof as to Lee's observations or his state of mind through Lee himself; rather, he sought to elicit testimony regarding his state of mind through the back door with Spicer's testimony.

A trial court's rulings regarding the admissibility of evidence may be reversed only upon a showing of manifest abuse of discretion. *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992). A trial court abuses its discretion when it adopts a view "no reasonable person would take." *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

A criminal defendant has a Sixth Amendment right to question witnesses and offer evidence in his defense. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.2d 576 (2010). This right is not absolute and is limited by rules governing the admissibility of evidence. *State v. Donald*, 178 Wn. App. 250, 263-64, 316 P.3d 1081 (2013). Evidence offered by a defendant in support of a self-defense claim must be relevant. *State v. Bell*, 60 Wn. App. 561, 564, 805 P.2d 815, *review denied*, 116 Wn.2d 1030 (1991); ER 402. To be relevant, the evidence must have a tendency to prove or disprove a particular fact that is of consequence to the determination of the action. *Bell*, 60 Wn. App. at 564; ER 401. The trial court has broad discretion in balancing the probative value of evidence against its prejudicial effect. *Bell*, 60 Wn. App. at 565.

Spicer could only testify about her observations and her state of mind. She could have testified that Lee was present, but not as to what he believed or that he knew Hernandez could become violent. Her testimony regarding Lee's state of mind would have been speculative and

inadmissible. Testimony about the alleged altercation and any fear Spicer might have had was not relevant to whether Lee feared Hernandez. Furthermore, evidence regarding the prior incident was subject to the balancing test under ER 403. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, among other considerations. ER 403. Prejudice must be substantial enough to disrupt the fairness of the fact-finding process at trial. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

Admitting testimony about the alleged incident would open the door to not only that incident but allegations of Lee's recent misconduct. Allowing all the witnesses to testify regarding the alleged incident would have unnecessarily served to distract the jury from deciding the issue at hand to determining whether the incident actually occurred. Conducting a trial within a trial would have unfairly impeded the fact finding process.

Defense counsel attempted to offer Spicer's testimony to show Lee's state of mind and whether he knew Hernandez was capable of being violent. (2RP 63-65). The trial court considered the purpose of introducing the evidence and conducted a balancing test, noting it was "more prejudicial than probative" to allow the testimony and that it would open the door to prior acts of the defendant. (2RP 64-65). The trial court

determined that admitting testimony about the earlier alleged act would open the door to Lee's prior misconduct and sought to avoid prejudicing him by excluding the evidence. The court did not abuse its discretion by excluding the testimony.

Excluding Spicer's testimony about the alleged incident and Lee's statement the he already had reason to be afraid of Hernandez did not prevent Lee from testifying as to his fear at the time of the incident or from obtaining a self-defense instruction. An alleged denial of the right to present a defense is reviewed de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

In *Jones*, the defendant was charged with rape. He intended to testify that he and the victim participated in an all-night consensual sex party. The trial court refused to let the defendant present this testimony or cross-examine the victim about the party. The Court held that excluding the testimony effectively barred the defendant (who did not testify) from presenting a meaningful defense in violation of the Sixth Amendment. *Jones*, 168 Wn.2d at 721.

Here, Lee sought to elicit from Spicer that they saw Hernandez involved in an altercation with his wife and that *Lee* knew Hernandez could become violent. (2RP 63-65). Spicer had already testified that Hernandez "came after" Lee "moving fast towards him like with his hands

up . . . like in a motion like he's coming after him." (2RP 69-69). She said it happened quickly and unexpectedly. (2RP 60). Lee also testified that Hernandez was coming at him and "sprang" at him with his hands up and he hit him because he was scared. (2RP 79-80). In contrast to *Jones*, the effect of excluding Spicer's testimony regarding Lee's state of mind (and Lee's excluded statement) did not prevent him from presenting his version of the events. He offered sufficient evidence that he reasonably believed he was about to be injured in order to support his self-defense claim and obtain the self-defense jury instructions. (2RP 114-15, CP 47 Jury Instruction No. 9). Spicer and Lee depicted Hernandez as the unreasonable aggressor. Based upon their testimony the jury certainly could have found that Lee believed he was about to be assaulted when Hernandez "came at him with his hands up" and that any fear was reasonable under those circumstances, but they chose not to. Excluding Spicer's testimony regarding Lee's state of mind and his statement did not deprive him of his Sixth Amendment right to present his defense.

Finally, if the trial court erred in excluding the testimony, any error was harmless. Error of constitutional magnitude is harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *Jones*, 168 Wn.2d at 724.

To support his self-defense claim Lee and Spicer both testified regarding Hernandez's actions in coming at the defendant with his hands up. (2RP 59-69, 79-80). Even if they had been allowed to testify about Hernandez "getting physical" with his wife a reasonable jury would no doubt convict the defendant considering the ample evidence against him. The undisputed evidence was that Lee and Spicer were welcome guests in Hernandez' home and were comfortable being together there. (2RP 54, 75). Lee argued with Spicer when she wanted to leave and he argued with Hernandez when he was told to leave. (1RP 31, 2RP 56, 76-77). Hernandez told Lee several times to leave. (1RP 100, 2RP 15, 33, 71, 78). He refused to leave, swore at Hernandez and hit him in the face. (1RP 31-32, 2RP 79-80). Moreover, Lee's attempt to testify that he already had reason to be afraid of Hernandez was negated by his own testimony that he wanted to stay in the home with Spicer and knew he should have left when asked, but continued to argue and swear and wanted to get "the last word in." (2RP 79, 81). Lee stated, "I went on to get in my last word that I was stupid enough to decide I was gonna do, which I shouldn't have done. I should have just left, but I was getting in my last words and judging him for--." (2RP 81). Clearly, the jury could have found that Lee was motivated by his desire to have "the last word" when he struck

Hernandez, and not acting in response to a reasonable fear he was about to become injured.

Even if it was error to exclude the testimony, the error did not materially affect the outcome of the trial in light of the other evidence against Lee and any error was harmless.

B. THE CITY DID NOT IMPROPERLY COMMENT ON LEE'S FIFTH AMENDMENT RIGHT TO SILENCE.

The defendant argues that the City improperly commented during closing argument on Lee's right to remain silent during closing argument.

A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Johnson*, 158 Wn. App. 677, 683, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011). A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Johnson*, 158 Wn. App. at 683. A prosecutor has wide latitude to draw reasonable inferences from the evidence and to express those inferences to the jury. *State v. Jungers*, 125 Wn. App. 895, 904, 106 P.3d 827 (2005).

Defense counsel's failure to object to prosecutorial conduct at trial constitutes waiver on appeal unless the conduct is so "flagrant and ill-intentioned that it evinces enduring and resulting prejudice" and is

incurable by a jury instruction. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006); *Johnson*, 158 Wn. App. at 685.

A defendant's prearrest silence is not admissible as substantive evidence of guilt. *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996); *State v. Easter*, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996). However, when a defendant testifies at trial, the use of prearrest silence may be used for the limited purpose of impeachment. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). The reviewing court must consider the purpose of the remarks and whether the prosecutor, by raising the defendant's silence, "manifestly intended the remarks to be a comment on that right." *Burke*, 163 Wn.3d at 216. Whether the defendant's constitutional right to silence is violated is reviewed for harmless error. *Burke*, 163 Wn.2d at 222.

A direct comment on the right to silence occurs when a witness makes reference to an accused's right to remain silent, such as when an officer testifies that he read the *Miranda* rights to a defendant but he refused to talk. *State v. Pottorff*, 138 Wn. App. 343, 346-47, 156 P.3d 955 (2007). A direct comment is reviewed using a harmless error beyond a reasonable doubt standard. *Pottorff*, 138 Wn. App. at 347. An indirect comment on the right to silence is one that could be inferred as an attempt to exercise that right, and is reviewed using the lower, nonconstitutional

standard of whether no reasonable probability exists that the error affected the outcome. *Pottorff*, 138 Wn. App. at 347.

In *Easter*, the defendant was charged with vehicular assault. The officer testified, over objection, that he thought the defendant was being a "smart drunk" because he was evasive and would not talk. The defendant did not testify. The prosecutor vigorously pursued the "smart drunk" theme in closing argument. The Court held that allowing the officer's opinion that the defendant was hiding his guilt by being a "smart drunk" compounded by the prosecutor's comments in closing was used to infer guilt and violated his Fifth Amendment right to silence and constituted prejudicial error. *Easter*, 130 Wn.2d at 241-243.

In *Burke*, the defendant was tried for third degree child rape. An officer interviewed him without *Miranda* warnings and his father intervened and advised him not to talk until they consulted an attorney. The prosecutor questioned the defendant as to why he did not tell the officer how old he thought the victim was. The State argued that the defendant had the opportunity to tell the officer what age he believed the victim was but terminated the interview. The Court held that the prosecution intentionally invited the jury to infer guilt when the defendant terminated the interview and suggested that he invoked his right to silence because he knew he had done something wrong. *Burke*, 163 Wn.2d at

222. Because the issue was whether or not the jury believed the defendant's testimony regarding the victim's age the repeated references to his silence undermined his credibility and improperly presented substantive evidence of guilt. *Burke*, 163 Wn.2d at 223.

In *State v. Jones*, 168 Wn.2d 713, 725, 230 P.3d 576 (2010), the defendant was charged with rape. An officer testified that after a warrant was issued for the defendant's arrest, he fled to Texas and never contacted the police about what happened and that he took a DNA test only after a court order forced him to. The defendant was not allowed to present evidence about a sex party to support his defense of consent. He did not testify, nor did any participants in the alleged sex party. The State argued in closing that the defendant did not try to clear up what happened and refused to provide a DNA sample. The Court reversed and remanded on Sixth Amendment grounds but agreed with the appellate court that the prosecutor improperly commented on the right to silence. *Jones*, 168 Wn.2d at 713.

In this case, the City never elicited testimony in its case in chief that the defendant refused to talk to the police. The City did not offer testimony to suggest that his prearrest conduct implied guilt that would force him to testify to rebut such an inference. Rather, defense counsel pursued questioning suggesting that Officer Mires did not get the

defendant's "side of the story." (1RP 86). Defense counsel asked the officer on cross-examination:

> Q: You didn't interview Mr. Lee or Ms. Spicer about what happened?
> A: No.
> Q: So, there was –their side of the story wasn't heard or in your report at all?
> A: Correct.
> Q: Okay. And you never heard their side of the story?
> A: Correct.

(1RP 86-87). Counsel also questioned Spicer and elicited that the police never tried to get a hold of her to interview her about the event. (2RP 66).

The City argued in rebuttal that neither the defendant nor Spicer were in the area when the police came, apparently did not wait for the police and did not call 911 to make a report. (2RP 135). The City stated further:

> And so, by insinuating, I think what the testimony was that, oh, the defendant didn't get an opportunity to tell his side. Well, it wasn't because the officer didn't do his job. There was nobody there to talk to. He wasn't there, and there was no—there was no reason for the officer to think he—well, they did try to go find him in the area. They couldn't find him. The other officer drove around, but they didn't find anybody. So, there was nobody to talk to to try to get the other side of the story.

(2RP 135-36). The argument was in response to testimony elicited by the defense and was intended to refute any insinuation that the defendant was prevented or unable to give his side of the story.

In addition, Lee attempted to paint himself as a victim of a silly misunderstanding. Spicer testified that she and Lee were having a "little argument, it was not that big of a deal, and they were trying to explain that it was nothing serious." (2RP 56-58, 59). Lee testified that he tried to reason with Hernandez and calm him down. (RP 78). He argued that he was "shocked" that his friend told him to leave over something that "got a little out of hand." (2RP 128).

Because Lee testified, his credibility could be challenged. His prearrest silence could be used for impeachment, but not as substantive evidence of guilt. *Burke*, 163 Wn.2d at 217. The City's reference to the defendant's absence at the scene was not an improper comment on his right to silence offered as substantive evidence of guilt, rather, it was offered for the purpose of countering any suggestion that he was not able to tell "his side of the story." There was no manifest intention to comment on his right to silence.

Moreover, evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance in determining guilt or innocence. *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965); *State v. Hudson*, 56 Wn. App. 490, 495, 784 P.2d 533, *review denied*, 114 Wn.2d 1016 (1990). This is because "flight is an instinctive or impulsive reaction to a consciousness

of guilt or is a deliberate attempt to avoid arrest and prosecution." *Bruton*, 66 Wn.2d at 112. Here, the jury could properly consider the defendant's leaving the scene along with other circumstances.

The City's comments in closing were not improper when viewed in context of the entire argument. The City was entitled to draw reasonable inferences from the evidence and did not suggest that Lee's failure to remain at the scene was substantive evidence of guilt. The comments here are distinguishable from those in *Easter*, *Burke*, and *Jones*. And, case law provides that evidence of flight may also be used to infer guilty knowledge.

Even if the City's argument could be inferred as an attempt to exercise the right to silence, any error was harmless. All the witnesses testified that Hernandez told Lee to leave more than once. (1RP 100, 2RP 15, 33, 71, 78). He admitted he should have left when asked but wanted to "get the last word" in. (2RP 79, 81). He admitted to yelling an obscenity at Hernandez and hitting him, but was adamant that Hernandez came at him with his hands up and he was scared. (2RP 79-80). The undisputed testimony was that the defendant was a visiting guest, refused to leave when asked, swore at Hernandez, and hit him in the face. (2RP 80, 127). The untainted evidence overwhelmingly established that Lee

assaulted Hernandez and did not act in self-defense. There is no reasonable probability of a different verdict here.

C. TRIAL COUNSEL'S REPRESENTATION WAS NOT DEFICIENT.

A challenge to the effective assistance of counsel is reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995), *review denied*, 129 Wn.2d 1012 (1996).

To demonstrate ineffective assistance of counsel, a defendant must establish that defense counsel's representation was deficient, in that it fell below an objective standard of reasonableness based upon all the circumstances, and that counsel's deficient representation prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The defendant bears the burden to establish from the record a sufficient basis to rebut the strong presumption of effective representation. *McFarland*, 127 Wn.2d at 335, 337. To support a claim of deficient performance, a defendant must show an absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). The prejudice prong requires the defendant to demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335.

If trial counsel's conduct can be characterized as legitimate trial tactics or strategy, it cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 401 (1986), *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); *State v. King*, 24 Wn. App. 495, 498, 601 P.2d 982 (1979). Defense counsel must be given wide latitude and flexibility in his or her choice of trial tactics in order to assure the attorney's best efforts in representing the accused. *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). The absence of a defense objection strongly suggests that the conduct at issue did not appear critically prejudicial to the defendant in the context of the trial. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d. 610 (1990). Counsel may not sit silent hoping for an acquittal and later use the claimed misconduct as a basis for appeal. *Swan*, 114 Wn.2d at 661.

Lee first argues that trial counsel's performance was deficient because he failed to object to the prosecutor's statements during closing argument. The City's argument was in response to testimony elicited by the defense to refute any inference that Lee did not get to tell his side of the story and was not used to imply substantive evidence of guilt. Lee fails to establish a lack of legitimate trial strategy or tactics and that failing to object was objectively unreasonable. Even if counsel's failure to object was deficient, Lee was not prejudiced. The jury had ample evidence to

determine that he assaulted Hernandez and did not act in self-defense. Lee fails to demonstrate that but for the error there is a reasonable probability the jury would not have convicted him.

Lee also argues that counsel should have objected to Officer Mires' testimony that he "fled the scene prior to police arrival" on grounds that it constituted improper opinion evidence. Officer Mires testified on direct that Lee had already left the scene by the time he arrived. (1RP 82-83). On cross examination, defense counsel established that the officer did not have personal knowledge of the incident, he spoke to some witnesses, but never heard Spicer's or Lee's "side of the story." (1RP 86). Counsel specifically asked:

> Q: You didn't interview Mr. Lee or Ms. Spicer about what happened?
> A: No.
> Q: So, there was—their side of the story wasn't heard or your report at all?
> A: Correct.
> Q: Okay. And you never heard their side of the story?
> A: Correct.

(1 RP 86).

On redirect the City asked the officer, "Why did you not interview the defendant or his girlfriend?" He replied, "They had fled prior to police arrival." (1RP 87). The purpose of the question was to clarify that Lee was not at the scene and could not be located to obtain a statement from

him and to dispel any implication that the officer neglected to obtain his "side of the story." The officer was stating a fact—that Lee was not there to interview—and not an opinion as to guilt. The City never asked the officer to interpret any meaning from the statement. Defense counsel opened the door for the City to ask the officer why he did not get a statement from Lee. Even if counsel had objected to the officer's choice of words there is no likelihood that the outcome of the trial would have been any different.

Thus, Lee fails to meet his burden of establishing both deficient performance and resulting prejudice to merit reversal.

D. LEE WAS NOT DEPRIVED OF A FAIR TRIAL DUE TO CUMMULATIVE ERROR.

The cumulative error doctrine is limited to instances when there are several trial errors that independently may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). For example, vouching and hearsay testimony, combined with the prosecutor's improper question and closing remarks despite previously sustained objections had the cumulative effect of denying a fair trial. *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992). But, errors that have little or no effect on

the outcome of trial do not give rise to cumulative error. *Greiff*, 141 Wn.2d at 929.

Here, the trial court did not abuse its discretion by excluding testimony from Spicer regarding Lee's state of mind or his statement about prior fear of Hernandez. The City's argument regarding Lee's absence from the scene was not an improper comment on a constitutional right when viewed in the context of the entire argument. Lee has not established that he received ineffective assistance because he fails to demonstrate both error and resulting prejudice. The claimed errors would have had little or no effect on the outcome of trial in light of the undisputed evidence that Lee committed the assault and ample evidence he did not act in self- defense.

IV. CONCLUSION

The trial court did not abuse its discretion by excluding evidence of a prior event. If error occurred, it was harmless because Lee was not prevented from presenting a defense and obtaining a self-defense instruction. The City's reference to Lee's absence from the scene was not used to infer guilt and was not an improper comment on the right to silence. Lee fails to demonstrate that defense counsel's failures to object constitute both deficient performance and prejudice. The claimed errors

would have little or no effect on the outcome of the trial to merit reversal due to cumulative error. Lee's conviction should be affirmed.

Respectfully submitted this 13 day of March, 2017.

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